No. 16-4300, No 17-1054

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MID-ATLANTIC RESTAURANT GROUP,

Petitioner

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT

Petition for Review of the November 30, 2016 Order of the National Labor Relations Board, Case No. 04-CA-162385

Kent E. Conway, Esquire
Nathan J. Schadler, Esquire
PA Attorney I.D. No. 88063/92885
Conway Schadler, LLC
3245 Ridge Pike
Eagleville, PA 19403
(P) (484) 997-2040
(F) (484) 997-2041
Attorneys for Petitioner/Cross Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

A. General Counsel's citations to the "Record" Are Misleading and As Such Support The Very Issue Raised in Petitioner's Brief.

General Counsel's citations to "record" in its Brief are not only misleading but they almost entirely prove Petitioner's point about the record and the lack of substantial evidence in this case. General Counsel's brief, on numerous occasions, mischaracterizes the testimony of the witnesses, particularly the witnesses called by Petitioner, in an effort to either support Robin Helm's testimony or to make it appear as if there are flaws or inconsistencies in their testimony, erroneously, in an effort to minimize it. Petitioner respectfully implores the Court look to the transcript, rather than rely on the misguided factual recitation in General Counsel's brief.

Petitioner does not, in its brief, attempt to relitigate the hearing. However, an exploration of the facts and testimony is necessary to demonstrate the unsupported and flawed nature of the NLRB's case as well as the large quantity and quality of evidence that was ignored or flippantly dismissed with only a cursory, pretextual explanation. Such and examination is required by controlling case law. See MCPc, Inc. v. N.L.R.B., 813 F.3d 475, 493 (3rd Cir. 2016).

The near entirety of General Counsel's cites to the record, in support of their case, are to the testimony of Robin Helms and decision of the ALJ, and not to any

physical evidence or to the numerous other witnesses, including independent witnesses, who testified in this matter. General Counsel does nothing to contradict the substantial points made by Petitioner other than to cite back to the flawed determinations by the Board and ALJ. General Counsel proves Petitioner's argument: the "evidence" relied on for the decision rest solely story of Robin Helms, which was not supported by a single witness or piece of physical evidence, while inappropriately dismissing the significant countervailing evidence, numerous witnesses and substantial physical evidence, in the case. MCPc, Inc. v. N.L.R.B., 813 F.3d 475, 493 (3rd Cir. 2016) (finding the ALJ failed "to take into account significant countervailing evidence in the record"). In fact, virtually the entire recitation of the background of this matter by General Counsel cites only to the Board's parroting of the ALJ's findings and Robin Helms' unsupported testimony. See Resp. Br. at 4-9.

The only times other portions of the record are cited, General Counsel incorrectly characterizes, or misstates, the testimony. As an example, the citations to Angie Mitchell's testimony are wholly misleading. General Counsel cites her as describing Robin Helms as a good employee while leaving out the original part of Angie's statement where she describes other employees desiring to not be scheduled with Robin because of her complaining. (JA 391a; Tr. 256:3-24). In another example, General Counsel states that Ms. Helms did not receive "written"

disciplined prior to her discharge, with the clear implication being that Ms. Helms had no prior disciplinary issues. Resp. Br. at 4. This is wholly incorrect as Angie Mitchell testified that Robin Helms was previously disciplined because she was caught by a spotter giving away free drinks and was spoken to by manager Kristen Lang. (JA 393a-394a; Tr. at 258:2-259:7).

In addition, there are stunning admissions in General Counsel's recitation of the facts that fail to square with their later arguments. General Counsel admits Ms. Heyward experienced racist behavior from her co-worker Robin Helms. Resp. Br. at 7. General Counsel tries to bury this, which squares with the tactics of General Counsel at the hearing when they tried to claim that racism is not really a big deal. (JA 440a-441a; Tr. at 305:9-12; 306:4-9) ("Have you -- isn't it true that Villanova's nickname is Vanilla Nova?"). Ms. Mitchell credibly testified that when informed of the incident she "immediately thought Chelsea could sue me today probably for a racist remark to a minority employee." (JA 404a; Tr. at 269:18-20). General Counsel admits that this conduct occurred. Also, Angie testified about the potential explosive situation that such racist behavior presented, as some of the employees at Kelly's were and are African- American and would surely find out about these racist statements. (JA 403a; Tr. at 268:1-20).

The evidence showed Robin Helms was terminated the next time she came into work after this incident (General Counsel, erroneously - as discussed *infra* -

tries to claim Robin Helms complained about shifts after this incident, which is wholly untrue and is yet another instance where the record is misquoted in an effort to support Ms. Helms). Despite this fact, General Counsel continues to assert that Ms. Helms "complaints regarding shifts" were the true reason for her departure. This is virtually the definition of failing to account for "significant countervailing evidence" that was decried in MCPc., 813 F.3d at 493.

General Counsel's Brief further makes much of the "failure to mention" the Heyward incident in the termination meeting. General Counsel completely mischaracterizes the record in stating that nothing was raised in the termination meeting about refusing to serve an African-American patron. General Counsel fails to cite the portion of Angie Mitchell's testimony where she clearly testified that Robin Helms admitted failing to serve a patron after denying it initially in the termination meeting. (JA 407a; Tr. at 272:1-24). Mrs. Mitchell simply said that she could not recall if the topic of race was brought up at that time, but the record clearly demonstrates Ms. Helms was confronted during the meeting and admitted failing to serve a patron. Mr. Henry, further testified that this was the case in his testimony. (JA 516a; Tr. at 381:5-12).

General Counsel, then, tries to invent a conflict in testimony that does not actually exist, presumably in an effort to weaken the testimony of Petitioner's witnesses. They do this in regard to Gene Mitchell bringing up race at the above-

mentioned meeting. This, however ignores the fact that everyone, including Robin Helms, agrees that Eugene Mitchell left the meeting before it was concluded. See, e.g., (JA 408a-409a; Tr. at 273-74). Gene Mitchell also testified that there was no need to bring it up based on how the meeting went although he certainly thought it was an issue. (JA 427a; Tr. 292:4-25).

According to the testimony of ***every other person*** at the termination meeting, other than Ms. Helms, Ms. Helms acknowledged that she failed to serve a patron and that she was not happy and burnt out. (JA 426a; Tr. at 291:1-11); (JA 427a; Tr. at 292:4-19); (JA 406a; Tr. at 271:23-272:9); (JA 407a; Tr. at 272:10-19); (JA 407a; Tr. at 272:20-25); (JA 516a; Tr. at 381:5-16). It is most notable that all accounts of the meeting by everyone but Robin Helms, even if slightly different (as would be expected when people are honestly trying to give their best recollection), are far more consistent with each other than with Robin Helms completely unsupported version of events. Not a single participant at the above described meeting corroborates **anything** that Robin Helms said, in any respect, however, both General Counsel and the ALJ handle this by labeling ***everyone*** at the meeting a liar, save Ms. Helms.

General Counsel's Brief fails to address the flood of independent witnesses – some who no longer work for or are associated with Gene and Angie Mitchell – rather either "manufacturing" problems with their testimony, or completely

ignoring it, clear violation of MCPc. Independent witness Chelsea Heyward specifically testified that in talking to Mrs. Mitchell about Ms. Helms she said "I raised the issue with the two girls that came in that I felt like [Helms] really clearly wasn't paying attention that her comments were to a black girl about not wanting to wait on black people." (JA 331a; Tr. at 196:17-25). Mrs. Mitchell stated that "spoke to Chelsea Heyward, an employee hired in April 2015, when she quit and Ms. Heyward relayed that she had done so because she did not like the environment." (JA 400a; Tr. at 265:19-266:3). Mrs. Mitchell testified that Ms. Heyward said to her that Ms. Helms "was mean to her and said these nasty things" and that "Robin Helms is a racist." (JA 401a; Tr. at 266:8-13). Mrs. Mitchell relates that Ms. Heyward said Ms. Helms refused service to a black customer and said "you know, you can't not serve somebody because they're black." (JA 401a; Tr. at 266:15-267:1). General Counsel admits that this is the case, however, despite the abhorrent nature of this racist conduct, simply and without any explanation, labels it as "pretextual." Resp. Br. 26-28.

General Counsel grossly misstates the record in its attempt to support their theory that there was animus towards Ms. Helms. A review of the record shows that this argument is simply not supported by the record. General Counsel points to the timing of Ms. Helms' discharge after her supposed "protected complaints" as circumstantial evidence of their animus toward Ms. Helms. See Resp. Br. at 25-

26. General Counsel mysteriously argues that Robin Helms' complaints were actually closer in time than the tipping incident, however, cites no actual support. The assertion that Ms. Helms complaints were closer in time to her separation than the tipping incident is simply a fabrication by General Counsel. It is undisputed that ***the very next time*** Robin Helms came into work after Angie Mitchell received reports about racist behavior in regard to her and that she was partially at fault for Ms. Heyward leaving, Ms. Helms' separation from Kelly's occurred. Mrs. Mitchell testified that after talking with Ms. Heyward she determined to call in Ms. Helms on her next shift to discuss this incident and that took place of April 30, 2015 and this fact is not disputed by anyone. (JA 405a; Tr. at 270:11-20). Even under Robin Helms' story, there was no opportunity for her to make complaints about shift scheduling in between. General Counsel understands that it is extremely powerful that the tipping incident directly preceded Robin Helms' departure and therefore is more likely the cause as opposed to generalized complaints reaching back months and if you count the prior evidence Kelly's objected to, years. General Counsel has manufactured facts without support.

General Counsel, despite claiming animus, once again fails to address the crucial point regarding Kris Flood, who according to Ms. Helms joined her in approaching management regarding shifts. If the Mitchells had such great animus toward these complaints, it makes absolutely no sense whatsoever that Ms. Flood

still works for the Mitchells, especially when Angie Mitchell admitted to knowing Ms. Flood was concerned about scheduling with the new hires. See (JA 396a; Tr. at 261:10-15; JA 311a; 176:7-177:2). If the Mitchells' motive was truly about punishing people who expressed concerns about scheduling, then Ms. Flood would have been fired, or at least disciplined, as well. The fact that she has not been and in fact was promoted proves, beyond any doubt, that Respondent was not targeting "complaining about shift schedules." General Counsel does not even attempt to explain this away because it cannot.

Furthermore, General Counsel refers to an ex-employee named Sarah Clark in an effort to show animus toward "protected activity." The evidence regarding Sarah Clark actually cuts against Ms. Helms' claims in yet another important respect that General Counsel does not raise, address or mention. Sarah Clark was one of the individuals Ms. Helms alleges registered complaints about shift schedules. (JA 192a; Tr. at 57:5-25). However, the evidence showed that Sarah Clark left voluntarily after her graduation from Villanova University. (JA 421a; Tr. at 286:10-16). Sarah Clark was not terminated, nor even spoken with about shift schedules.

With regard to the incident General Counsel refers to regarding Ms. Clark, Mr. Mitchell testified that the issue was addressed as Ms. Clark was reprimanded and Ms. Clark acknowledged the issue, was contrite, and said that the patron was

intoxicated. (JA 452a, 458a; Tr. at 317:9-11; 323:10-25). General Counsel cites Ms. Clark as a "departure from prior practice" in that they somehow treated her differently than Robin Helms. Even assuming they had treated Sarah Clark differently, no one has ever claimed that there was an actual protocol in place that was breached and Sarah Clark's case was actually in line with how Robin Helms was treated when she was previously disciplined. Sarah Clark does not in any way, despite General Counsel's claims, support any idea of animus towards alleged "concerted activity" on the part of Gene and Angie Mitchell. Furthermore, the comparison of these two incidents is "apples to oranges." While certainly treating a patron disrespectfully is terrible, it pales in comparison to making racially degrading statements to a minority employee who was so disturbed that she quit.

General Counsel also furthers the ALJ's attempt to flippantly explain away the physical evidence in this case in an attempt to support the credibility of Robin Helms. Robin Helms clearly lied when she said she could not approach the Mitchells about scheduling and the physical evidence proves it. General Counsel states that the voluminous materials introduced by Petitioner showing the staff regularly contacting Angie and Gene Mitchell about scheduling issues are merely "routine items." Resp. Br. at 25. However, an actual review shows that all of them are about scheduling. Several refer directly to shift scheduling issues and at least ***one refers directly to one employee's concerns about scheduling over the***

summer given certain renovations and whether she would have to get a second job. (JA 635a). This is precisely the issue that General Counsel claims Robin Helms was terminated over, inquiries about getting lucrative or enough shifts to make sufficient money.

The above physical evidence dovetails with the testimony of Michael Bevevino and Ryan Henry, two independent witnesses, both of whom Ms. Helms alleged had discouraged her from contacting Gene and Angie Mitchell with complaints. When Mr. Bevevino and Ryan Henry actually testified, they testified completely opposite regarding the approachability of the Mitchells. See (JA 496a; Tr. at 361:13-20); (JA 516a; Tr. at 381:17-382:6). General Counsel does not attempt to square this clear testimony with their repeated assertion that Ms. Helms' testimony was uncontradicted.

Finally, even though General Counsel falsely claims that the "tipping incident" did not come up in the termination meeting, General Counsel fails entirely to address the issue that even under Robin Helms' version of events, she was not terminated for protected activity. Rather, Robin Helms' testimony was that Angie Mitchell stated that what was paramount to her and Gene Mitchell was that Robin Helms had "hurt their feelings" by talking negatively about them. (JA 203a; Tr. at 68:8-16). It must be remembered that the *Wright Line* Test is designed to "preserve what has long been recognized as **the employer's general freedom to**

discharge an employee 'for a good reason, a poor reason, or no reason at all, so long as the terms of the [Act] are not violated.'" See MCPc, 813 F.3d at 487-88 (emphasis added). If the Mitchells discharged Robin Helms for hurting their feelings by talking badly about them as bosses, while that is ridiculous, it would not be illegal and would have nothing to with shift scheduling. General Counsel acknowledges Robin Helms' testimony but fails to address its significance.

Despite General Counsel's effort to support the ALJ's factual findings in this case, they run into the same problem, they are unable to explain away the large volume physical evidence and uncontradicted testimony of independent witnesses. In doing so, they run squarely into the evils outlined in this Court's MCPC decision. It is respectfully requested that this Court not do the same, and recognize the significant problems in attempting to twist, cajole and ignore evidence in order to support Robin Helms.

B. General Counsel Fails to Respond to Petitioner's Argument on Concerted Activity and Admits Robin Helms' Motivations.

General Counsel commits a fatal error in its argument regarding concerted activity, one that goes against long standing case law. As Petitioner stated in its initial Brief, it is not enough to say that a worker complained about work and that others were present, the Court must examine what the complaints were about. General Counsel makes the argument that "Helms' subjective motive for raising

concerns about scheduling – her belief that she and other more senior bartenders should get the more lucrative shifts – is irrelevant."[1] Resp. Br. at 21. Despite General Counsel's statement that we should not look at Ms. Helm's motive, well settled case law states the exact opposite.

> This Court as stated with regard to concerted activity under the Act that:
>
> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.'

Mushroom Transportation, 330 F.2d 683, 685 (3d. Cir. 1964). The MCPc case stated that "[a]lthough merely complaining in a group setting would surely not be sufficient in itself to transform an individual grievance into concerted activity, ...in such circumstances a lack of prior planning does not foreclose a finding of concerted activity, where the individual's statements further a common interest or by their terms seek to induce group action in the common interest." See MCPc, 813 F.3d at 485. The Court concluded that "[w]hen synthesized, the relevant precedent from our Court and the Board reflects that ***the benchmark for determining whether an employee's conduct falls within the broad scope of***

[1] It should be noted that even in this admission, General Counsel still gets the facts wrong. Robin Helms never said that she was concerned about "more senior bartenders" getting shifts although General Counsel fabricates this to make it sound more "concerted." Robin Helms never expressed concern about anyone other than herself. See (Tr. at 355:16-21) (Angie Mitchell); (Tr. at 360:18-23) (Mike Bevevino); (Tr. at 382:22-383:1) (Ryan Henry); (Tr. at 378:1-7) (Robert Stedeford); (Tr. at 199:18-25) (Chelsea Heyward); (Tr. at 98:25-99:5) (Robin Helms) ("I wanted to make sure that that had earned me the better, more lucrative shifts.").

concerted activity is the intent to induce or effect group action in furtherance of group interests." See id. at 486. (emphasis added).

Despite the fact that this very Court proclaimed that the intent to induce or effect group action is the "benchmark" for concerted activity, General Counsel makes the puzzling argument that Robin Helms' intent was irrelevant. General Counsel's argument boils down to the idea that because Robin Helms advocated for herself with others around at times, it is good enough. This is a false notion. See MCPc, 813 F.3d at 485 ("merely complaining in a group setting would surely not be sufficient in itself to transform an individual grievance into concerted activity."); Snyder v. Dietz & Watson, Inc., 837 F. Supp. 2d 428, 454 (D.N.J. 2011) ("An individual's action, even if presumably of interest to other employees, is not in itself 'concerted activity' under the NLRB."). In addition, as pointed out previously by Petitioner in their initial Brief, no one, including Robin Helms, ever testified that Robin Helms ever advocated or anyone other than herself.

General Counsel then tries to claim that Petitioner "admitted" that Petitioner knew about her complaints on shift scheduling. See Resp. Br. at 22-23. This is again, somewhat misleading. First and foremost, they cite Gene Mitchell's testimony without noting that while he admitted that Ryan Henry said Robin Helms was complaining about shifts to other employees, he noted that much of her complaints were about other issues and that it affected morale negatively. (JA

298a; Tr. 163:5-10). They then cite Angie Mitchells testimony about complaints about the new hires but fail to mention that Angie Mitchell also testified that Robin Helms was complaining about the late nights, college students, her job and virtually everything else. (JA 311a-313a; Tr. 177:18-179:3). They then cite Robin Helms' unsupported testimony that Angie Mitchell that she was aware of the staff complaint about "working conditions," not shift scheduling specifically.

General Counsel seemingly forgets that their claim is that Robin Helms' claim is about concerted activity relating to shift scheduling, not other conditions of employment. Nothing shows that the Mitchells were ever aware that shift scheduling complaints that came from Robin Helms had become a group issue instead of merely a small piece of Robin Helms' continuing complaints. The issues that Petitioner raised regarding concerted activity in this matter are completely unchallenged and the stunning admission of General Counsel above makes it even stronger.

C. General Counsel Misapprehends Plaintiff's Claims on Due Process and Ignores a Crucial Issue

General Counsel, while citing numerous cases about administrative law and notice pleading, entirely misses the point on Petitioner's claims about the process in this matter, and how its claim is intertwined with the Bill of Particulars. Petitioner's issue is not whether, when looked at in a vacuum, does the Complaint

in this case meet appropriate pleading standards, it is when looking at the Complaint, and the willful actions by the NLRB both before and during trial, does the Complaint as written provide due process, or comport with notice pleading requirements. It clearly does not.

The Complaint provided a time frame of two months, named Gene and Angie Mitchell and Ryan Henry as managers and provided the concerted activity as complaints about shift schedules. Petitioner, in an effort to understand the full nature of the NLRB's Complaint, as the Complaint was so bare bones and scant, filed for a bill of particulars – this is where the NLRB's Complaint and behavior runs afoul, which is the point that General Counsel has missed. The NLRB willfully opposed the motion and, on account of that opposition, Petitioner's motion was denied. Petitioner engaged in several calls with the former ALJ and the NLRB where on numerous occasions both Petitioner and the former ALJ directly asked the NLRB if the Complaint was going to be expanded in any whatsoever, the NLRB represented to the ALJ that they would not be expanded in anyway. The NLRB began their case-in-chief with an immediate gross expansion of the time and added an additional manager, this served as the factual and legal basis for the NLRB's case, and the General Counsel's Brief.

General Counsel and the NLRB would be in a far superior position had Petitioner not moved for a bill of particulars or if the NLRB had not affirmatively

stated to both Petitioner and the ALJ that the Complaint was so scant because there is nothing else; rather, it is the willful conduct of the NLRB, in conjunction with the Complaint that that articulates the fundamental unfairness. Without stating such, General Counsel's brief stands for the proposition that the willful concealment of facts, and affirmative false statements to Counsel and the Court about the scope of the Complaint, the facts and witnesses, is wholly consistent with due process and notice pleading. The caselaw is clear: it does not. Curtiss-Wright Corp., Wright Aeronautical Div. v. N. L. R. B., 347 F.2d 61, 72 (3d Cir. 1965) ("The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought.").

General Counsel has to admit that Petitioner was not aware of the claims in this case so General Counsel changes to its fallback position, which is that the ALJ gave an opportunity to present evidence that Petitioner did not utilize. This is a falsity, as the ALJ clearly stated that he would not consider the past conduct. Petitioner did not present evidence because such evidence would have been irrelevant, as the ALJ was not considering the conduct as a basis for an unfair labor practice. (JA 039a, n.3). Despite this clear ruling, the ALJ opinion, as does General Counsel's brief, liberally details conduct covered by the aforementioned ruling.

Petitioner was lulled into a false sense of security, as based upon the clear language of the ALJ's ruling, there was no need for the request of additional time, as the evidence was not going to be considered. Clearly, this is not what happened and the evidence was not only considered, but clearly relied upon as the basis for a finding to of an unfair labor practice. General Counsel's attempt to hold Petitioner hostage to the ALJ's first part of his ruling (allowing Petitioner more time) without considering the second half (that he is not going to consider the evidence offered as a basis for an unfair labor practice) is grossly unfair, it is respectfully suggested that this Court should not do so.

CONCLUSION

The vast majority of Respondent's Brief in this matter either misstates the record or completely makes things up. For the reasons above and stated in Petitioner's initial Brief, the decision in this matter must be reversed.

CONWAY SCHADLER

By: /s/ Nathan J. Schadler
Kent E. Conway, Esquire
Nathan J. Schadler, Esquire
PA Attorney I.D. No. 88063/92885
Conway Schadler, LLC
3245 Ridge Pike
Eagleville, PA 19403
(P) (484) 997-2040
(F) (484) 997-2041
Attorneys for Petitioner/Cross Respondent

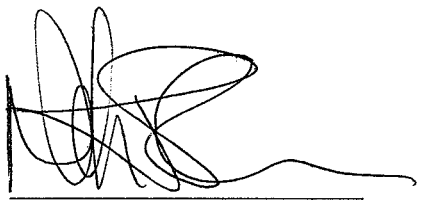
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   This brief contains 4,166 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) because:

   This brief has been prepared in a proportionally spaced typeface using Times New Roman, Size 14



By: _____
Nathan J. Schadler

CERTIFICATE OF SERVICE

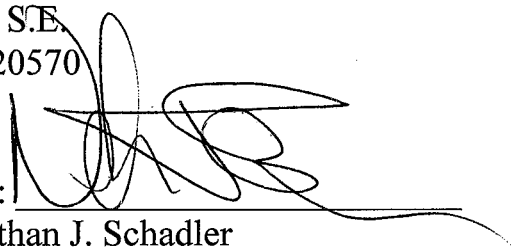
I, Nathan J. Schadler, Esquire, hereby certify that on the date set forth below two copies of the foregoing Brief for Petitioner/Cross-Respondent and Joint Appendix were served via First Class United States mail, postage prepaid, and electronic filing upon the following:

Julie B. Broido, Esq.
National Labor Relations Board
Appellate and Supreme Court Litigation Branch
1015 Half Street, S.E.
Washington, DC 20570

Linda Dreeben, Esq.
National Labor Relations Board
Appellate and Supreme Court Litigation Branch
1015 Half Street, S.E.
Washington, DC 20570

Gregory P. Lauro, Esq.
National Labor Relations Board
Appellate and Supreme Court Litigation Branch
1015 Half Street, S.E.
Washington, DC 20570

Kellie Isbell
National Labor Relations Board
Appellate and Supreme Court Litigation Branch
1015 Half Street, S.E.
Washington, DC 20570

By: 
Nathan J. Schadler

Dated: October 19, 2017